IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 20, 2006

STATE OF TENNESSEE v. JAMES EDWARD TAYLOR

Direct Appeal from the Criminal Court for Davidson County
No. 2002-B-713 Cheryl Blackburn, Judge

No. M2005-01060-CCA-R3-CD - Filed October 13, 2006

A Davidson County Criminal Court jury convicted the appellant, James Edward Taylor, of first degree felony murder and especially aggravated robbery, and the trial court sentenced him to consecutive sentences of life and forty years, respectively. On appeal, the appellant claims that the trial court should have granted his motion to suppress eyewitness identification testimony and his motion to suppress his confession to a fellow jail inmate. The appellant also contends that the trial court should have excluded from evidence a videotaped conversation between him and the inmate; that the trial court improperly ruled that Officer Gary Smith's testimony about the appellant's familial relationship with his codefendant was admissible pursuant to Tennessee Rule of Evidence 803(19), the hearsay exception for reputation concerning personal or family history; that the trial court erred by allowing Officer Smith to testify because the defense lacked prior notice; that the trial court improperly allowed witnesses to give hearsay testimony about the victim's statements under Tennessee Rule of Evidence 804(b)(2), the dying declaration exception to the hearsay rule; and that the evidence is insufficient to support the convictions. Upon review of the record and the parties' briefs, we conclude that the trial court erred by admitting Officer Smith's testimony under Tennessee Rule of Evidence 803(19). However, the error was harmless, and we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

Dwight E. Scott, Nashville, Tennessee, for the appellant, James Edward Taylor.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Pamela Anderson and Roger Moore, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On July 13, 2001, the appellant robbed the Always Antiques store in Madison, Tennessee and shot and killed one of the store's owners, Gary Dean Finchum. The appellant and his cousin, Sabrina Lewis, were indicted for first degree murder and especially aggravated robbery but were tried separately. At the appellant's trial, Linda Finchum, the victim's wife, testified that the victim was an antiques expert and that their store was full of antique furniture, jewelry, and toys. The victim would buy antiques from customers in the store, and he kept a book on the store counter where he wrote down every item he bought and how much he paid for it. The victim also recorded the seller's name and driver's license in the book. Often, the victim would write down the seller's information on a piece of paper and transfer the information to the book later. The Finchums kept money in the store's cash register, and Finchum had known the victim to carry as much as two thousand dollars on his person. The victim also kept a pistol in his briefcase and kept the briefcase beside him at the store's counter. The store was next door to Pugh's Pharmacy, and the two businesses shared a wall. Although the antique store had a front door and a back door, the back door was blocked off, and no one used it.

Finchum testified that about one month before the victim's death, a woman came into the store and wanted to sell two black vases. The woman had one of the vases with her, but the victim was not there, and Finchum told the woman that she would have to come back and show the vases to him. About one week before the victim's death, the victim and Finchum were working in the store when the woman returned. She did not have the vases with her but walked around the store and asked "kind of off-the-wall questions." Finchum later picked out Sabrina Lewis' photograph from a photographic array and identified her as the woman with the vases.

Finchum testified that on the morning of July 13, 2001, the victim left home in order to open the store. About 10:15 a.m., he telephoned Finchum and told her that "the woman with the vases is coming in." Finchum got ready for work and went to Always Antiques. When she arrived, she saw a fire truck and police cars and learned that something had happened to the victim. Someone gave the victim's wallet to Finchum, and she rode with the victim in the ambulance to the hospital. At the hospital, Finchum checked the victim's wallet and found money inside. The victim later died during surgery. Finchum stated that police officers found a hat in the store and that she did not recognize the hat. On cross-examination, Finchum acknowledged that she did not know if any money was taken from the victim.

Brenda Farmer testified that on July 13, 2001, she was working as a pharmacy technician at Pugh's Pharmacy. The victim came into the pharmacy about 9:00 a.m. Later that morning, Farmer and fellow employee Judy Summers were working in the pharmacy when they heard noises that sounded like boxes falling. Farmer went to the storage room to investigate, and Summers looked out the back door and into the parking lot. Neither of them saw anything amiss, and they concluded that the noise had come from Always Antiques next door. About fifteen minutes later, Farmer and Summers went to the antique store to "bug Dean and Linda and tell them to quit making so much

noise." When they entered, the store was quiet. Farmer called out and heard the victim yell from the back of the store, "[H]elp me, help me." Farmer went to the victim and saw him lying on his stomach. He was rolling around and said, "[H]elp me, I've been shot." The victim was holding his chest, and Farmer saw blood on his shirt. She said that he "appeared very frantic and scared and kept saying . . . help me, get me some help . . . I've been shot." Farmer ran back to the pharmacy and told employees to call 911.

Farmer testified that she returned to the victim, that glass was on the floor, and that the victim was rolling in the glass. She saw an overturned table and a hat on the floor very close to the victim, and the victim told Farmer that the hat did not belong to him. The victim was in pain, and Farmer asked him who had done this. The victim said, "[A] black man in blue jeans" and told Farmer that "they" tried to rob him. The victim gave his wallet to Farmer, and Farmer later gave the wallet to Linda Finchum.

Judith Summers testified that on July 13, 2001, she and Brenda Farmer were working in Pugh's Pharmacy when they heard "a lot of racket coming from next door." The noise was very loud and sounded like something had been knocked over. Summers looked out the pharmacy's back door and into the parking lot. She saw a car with its motor running backed into the lot. The car's passenger door was open, and someone was sitting in the passenger seat. The person looked as if he or she had just gotten into the car or was about to get out of it because the person's right foot was on the ground and the person's hand was on the open door. The front seat of the car appeared to be crowded, and Summers believed three people may have been sitting on the front seat. Summers went back into the pharmacy, and she and Farmer decided to go next door to check on the victim. When they entered the antique store, Summers heard the victim faintly say, "Help me, help me." He was lying on his stomach, and blood was on the floor and on his shirt. The victim said, "I've been shot in the heart, call 911." Summers asked the victim who shot him, and he said, "It was a black man." The victim asked Summers to get his wallet out of his back pocket, and Summers saw that the victim's wallet was about half-way out of his pocket, which was unusual. Summers handed the wallet to Farmer. On cross-examination, Summers testified that she believed the car was an older model because "it was longer than the way they build cars now." She said it may have been gray in color.

Mary Ann Fisher testified that on the morning of July 13, she was driving to a pet store on Gallatin Road and was traveling away from downtown Nashville. She stopped at a traffic light in front of Always Antiques, which was to her right. An African-American man came out of the store "and was standing there swaying back and forth and he had something black in his hand going from one hand to the other with it." The man was wearing a red short-sleeve shirt, blue jeans, and tennis shoes and had very short hair. He was about six feet tall and skinny, and Fisher saw his face. The man ran behind Fisher's car and vanished. Fisher noticed that two women, who had been standing on the corner near the antique store, disappeared when the man disappeared. One of the women was heavy-set and had long, blond, curly hair, and the other woman was African-American, a little heavy-set, and had short, straight hair that was turned under.

Fisher testified that just as the traffic light turned green, a car came out from between the pet store and Always Antiques. Although the traffic light was red for the car, the car ran the red light, went through the intersection, turned left, and traveled toward downtown Nashville. A woman was driving and was "talking and turning her head back and forth." When Fisher came out of the pet store, she saw police cars everywhere and told a police officer about what she had seen. The officer wrote down her name and address, but the police did not contact her until January 2002, while Fisher was in confinement for driving under the influence (DUI). Detective E.J. Bernard visited Fisher and showed her photographic arrays. Fisher picked out the appellant's photograph and two women's photographs. She stated that the appellant had short hair when she saw him on July 13, 2001, but that he had braids at trial. She stated that she had not received any assistance or money for her cooperation with the police.

On cross-examination, Fisher acknowledged that the appellant was not wearing a hat or sunglasses when she saw him outside Always Antiques. She denied having a drinking problem, said that she drank alcohol only on weekends, and said that she had not been drinking on the morning of the crimes. She acknowledged that she saw the appellant's face for only a few seconds and did not see him get into a car. She said that Detective Bernard showed her quite a few photographic arrays and that she was sure the appellant was the man she saw on July 13.

Metropolitan Nashville Police Department Officer James Chastain testified that he heard about the robbery over his police radio about 11:25 a.m. and arrived at Always Antiques about one minute later. Two women met him at the front door and were very excited and upset. Officer Chastain saw the victim lying in an aisle of the store, and the victim was conscious but appeared to have two gunshot wounds to his forearm. The victim's breathing was labored, the victim was very excited, and the victim said that he had been shot three times. Officer Chastain saw a shattered vase on the floor and asked the victim if he had been robbed. The victim said, "He tried to" and described the robber as an African-American male, young, but older than a teenager. The victim also said that a hat on the floor belonged to the robber. Paramedics arrived and put an oxygen mask on the victim, and Officer Chastain saw that the victim also had a gunshot wound to the chest. The victim pulled down the oxygen mask and said, "Officer, Officer, the lady's information is on the desk." Officer Chastain asked, "What lady are you talking about[?]" and the victim said, "The lady that was in here earlier, the lady with the vases." Another officer walked over to the desk and retrieved a piece of paper that had Sabrina Lewis' name, her driver's license, and "two vases" written on it. Officer Chastain asked the victim if the woman was connected to the crimes, and the victim said, "I know she is." After paramedics removed the victim from the scene, officers found a bullet on the floor where the victim had been lying. Officers also found another bullet in the ceiling. About two hours later, Officer Chastain and other officers went to Lewis' home to speak with her. On cross-examination, Officer Chastain testified that they did not see the appellant in or around Lewis' home.

Detective William Stroud testified that he and the victim were personal friends and that he heard about the robbery over his police radio. He arrived at Always Antiques and saw paramedics working on the victim, who was about six feet, four inches tall and weighed more than three hundred pounds. The victim recognized Detective Stroud and said, "The lady with the vases, her name is on

the counter." Detective Stroud knew that the victim often took notes on people who brought items into the store to sell. He went to the counter and saw Sabrina Lewis' name and driver's license number written on a piece of paper. A dresser was turned sideways, and a broken figurine was on the floor. The cash register did not appear to have been disturbed.

Metro Police Officer Charles Anglin testified that he was called to Always Antiques on July 13 and arrived about 11:45 a.m. After paramedics removed the victim from the store, officers secured the scene and began to process it for evidence. The back door of the store had been blocked from the inside and the outside, and no one could get through it. The police found no spent shell casings in the store but found a bullet strike on top of a piece of furniture. The bullet ricocheted off the furniture and entered a ceiling tile, where it was recovered by police. Officers also found a broken figurine and a bullet on the floor. Officers collected a hat and found a briefcase containing a five-shot revolver. Five live rounds were in the gun. On cross-examination, Officer Anglin testified that officers dusted areas of the store for fingerprints, including the front door, the front countertops, and two black vases.

Dr. Tom Deering from the Davidson County and State Medical Examiner's Offices performed the victim's autopsy. He testified that the victim was fifty-seven years old, was seventy two and one-half inches tall, weighed four hundred one pounds, and died at 4:05 a.m. on July 14, 2001. The victim had been given a tremendous amount of fluid in the hospital and was very swollen, which could have affected his weight. The victim had no head trauma but had a gunshot wound to his right forearm. The bullet exited the forearm and passed through the victim's upper right arm, indicating that the victim's arm was bent at the elbow when the bullet entered the forearm. The victim was also shot in the upper right chest. The bullet fractured a rib and lacerated the victim's diaphragm, liver, pancreas, small bowel, large bowel, and spleen. Dr. Deering recovered the bullet from the victim's left hip and believed that the victim would have realized he was seriously injured. Dr. Deering found no soot or stipple on the victim's skin or shirt, indicating that the gun was at least two feet away from the victim when it was fired. He concluded that the cause of death was multiple gunshot wounds and that the manner of death was homicide. On cross-examination, Dr. Deering testified that the victim was shot twice.

Metro Police Detective Clinton Vogle testified that he attended the victim's autopsy. A bullet was recovered from the victim, and Detective Vogle delivered it to the property room. About a month after the shooting, a woman named Debra Marks was arrested for a probation violation and made statements about the Always Antiques crimes. She admitted to having been at Always Antiques on July 13 and participating in the robbery. Marks also claimed that she shot the victim. Detective Vogle stated that Marks gave three conflicting statements and, based on the evidence, the police concluded that she had been present at the store as a lookout but had not shot the victim. Although police arrested Marks on a criminal responsibility theory, she was never indicted for a crime. On cross-examination, Detective Vogle acknowledged that the police had received information that an older-model gray Chevrolet or Oldsmobile may have sped away from the antique store and that Marks had such a car. He also acknowledged that Marks gave the police information about the shooting that had not been released to the media. For example, Marks knew where the

victim had been shot in the store and that a hat had been left at the scene. On redirect examination, Detective Vogle testified that the police ultimately concluded that two gray cars and three or more people had been involved in the crimes.

Metro Police Officer Gary Smith testified that he had seen the appellant previously at Sabrina Lewis' sister's house. Officer Smith's half-sister, Tori Renfro, told Officer Smith that the appellant and Lewis were cousins. Officer Smith stated that Sabrina Lewis' mother was Renfro's aunt and that Renfro and Lewis were first cousins.

Melvin Harding testified that in the fall of 2001, he was serving a ninety-day sentence in the Davidson County Jail for domestic violence and that the appellant was his cellmate in November 2001. One night, the appellant told Harding that he had something on his mind and wanted to talk about it. The appellant told Harding that "they have got the wrong person in jail, the lady" and that "I'm the one who committed the crime." The appellant then told Harding the following: The appellant, his cousin, and his aunt had gone to the antique store, and his cousin went in and "cased out some lamps." She came back to the appellant and told him that the victim had a lot of money in his wallet. The appellant, who was wearing a large sombrero and sunglasses and had shaved his head, went into the store. The appellant had a sock over his arm so that he would not leave fingerprints on the door. The appellant lured the victim to the back of the store, pulled out a .38 revolver, and ordered the victim to lie down. The appellant shot the victim in the shoulder and the stomach and then shot the victim a third time. The appellant got three hundred dollars out of the victim's front pocket but got scared and did not get "the big money . . . in his wallet." The appellant ran outside to his aunt and cousin, who were waiting in the car, and told them that he had shot the victim three times. According to the appellant, the police went to his cousin's house later that day because she had left some identification at the store.

Harding testified that he told his attorney about the appellant's confession and that the police contacted Harding. The police moved the appellant and Harding into a holding cell equipped with recording equipment, hoping that Harding could get the appellant to confess to shooting the victim. Although Harding tried to get the appellant to talk about the crimes, the appellant was suspicious and said, "I'm not going to talk about that in here because there may be cameras or there may be microphones." In return for helping the police, Detective Bernard loaned Harding twenty dollars. On cross-examination, Harding acknowledged having a 1988 conviction for aggravated assault and seeing information about the Always Antiques robbery on television. He denied that he assisted the police with their investigation in order to get out of jail early but acknowledged that the trial court "retired" his misdemeanor domestic assault conviction. He stated that he did not remember testifying at the appellant's preliminary hearing that Detective Bernard gave him a couple hundred dollars for his help with the case.

Metro Police Detective E.J. Bernard testified that he investigated the crimes at Always Antiques. In the summer of 2001, Debra Marks was arrested for a probation violation. She claimed to have information about the antique store crimes but gave the police some inaccurate information. For example, Marks said that she saw the appellant kick and hit the victim with a metal object, but

the victim's autopsy revealed that the victim had not been beaten. Marks also claimed that a hat left at Always Antiques came from a Family Dollar store, but Detective Bernard learned that the store did not sell the hat. Marks also claimed that a large amount of money had been taken, which was untrue. Marks finally admitted lying about the case. In December 2001, Detective Bernard interviewed Melvin Harding, and Harding gave him accurate details about the crimes that had not been released to the media. Based on Harding's statements, Detective Bernard believed Sabrina Lewis and her mother, Claudia Gordon, were involved in the victim's death. Police tried to record a conversation between the appellant and Harding, but the appellant would not talk about the crimes. Harding did not ask for any special treatment or large amounts of money in return for his help and "seemed generally concerned." Detective Bernard may have given Harding five or ten dollars and also loaned him no more than twenty dollars about four times.

Detective Bernard testified that during his investigation, he interviewed Mary Ann Fisher and prepared about eight photographic arrays, each containing six photographs. The different arrays contained a photograph of the appellant, Debra Marks, a male relative of Marks, Sabrina Lewis, or Claudia Gordon. Fisher did not seem to have any difficulty remembering July 13, 2001, and picked out Lewis', the appellant's, and Gordon's photographs but did not select Marks' photograph. Fisher told Detective Bernard that Lewis had been driving the older-model car that ran the red light. The appellant was indicted in April 2002 and arrested. The appellant told Detective Bernard, "You will be surprised when you find out who all was involved in the murder."

On cross-examination, Detective Bernard acknowledged that based on Fisher's statements, the appellant could not have been in the getaway car that ran the red light. However, he acknowledged that the car turned onto Gallatin Road and traveled in the direction that the appellant ran. Detective Bernard also acknowledged that other witnesses saw the car on Gallatin Road after the robbery but did not see the car stop on the road. He stated that although Marks gave some inconsistent information, she correctly knew where the victim had been shot in the store. Nevertheless, Detective Bernard found nothing to prove that Marks was in the store at the time of the crimes. The Tennessee Bureau of Investigation (TBI) tested hairs from the hat found at the crime scene and compared DNA from the hairs to the appellant's DNA. The TBI also tested hairs from Sabrina Lewis' sons. The parties stipulated that (1) mitochondrial DNA from the hairs in the hat did not match the appellant; (2) the DNA results did not exclude Sabrina Lewis' sons or male relatives as donors; (3) no fingerprint evidence linked the appellant to the victim's death; and (4) fingerprints recovered from the black vases found at Always Antiques matched Sabrina Lewis.

Metro Police Officer Michael Pyburn, a firearm and tool-mark examiner, testified that he examined three bullets. Two of the bullets were recovered at the antique store, and the third bullet was removed from the victim. Officer Pyburn examined the bullets and concluded that they were all fired from the same gun, which was a .38, .357, or .9mm handgun. No spent shell casings were found at the scene, indicating that the gun was probably a revolver. Several guns were turned in to the police department after the victim's murder, but Officer Pyburn concluded that none of the guns was used to shoot the victim. Officer Pyburn also compared the three bullets to bullet images stored

in a computer database but found no match. The jury convicted the appellant of first degree felony murder and especially aggravated robbery.

II. Analysis

A. Suppression of Fisher's Identification and Appellant's Confession

The appellant claims that the trial court erred by refusing to suppress evidence that Mary Ann Fisher selected his photograph from a photographic array. He contends that her identification of him was unreliable and, therefore, violated his right to due process, because she only saw the man's face for a few seconds and was making a cross-racial identification. The appellant also claims that the trial court should have suppressed his confession to Melvin Harding pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), because the appellant was in custody when he made the statements to Harding and because Harding was acting as a government agent. However, the appellant did not raise these issues in his motion for new trial, precluding consideration of the issues on appeal. Tenn. R. App. P. 3(e). Moreover, we discern no plain error. See Tenn. R. Crim. P. 52(b).

B. Suppression of Videotaped Conversation

The appellant claims that the trial court erred by refusing to suppress the State's introduction of his videotaped conversation with Melvin Harding into evidence. He contends that the videotape was highly prejudicial and violated his right to due process because it showed him incarcerated and wearing jail attire. He contends that suppression of the videotape was warranted because an audiotaped recording of the conversation was available and "would have provided the State with the opportunity to present the same information to the jury without the prejudicial effect of showing the Defendant incarcerated." The State claims that the probative value of the videotape outweighed its prejudicial effect and that the trial court offered to instruct the jury to disregard the appellant's prison attire, which "minimized any potential prejudice" to the appellant. We conclude that the appellant is not entitled to relief.

Prior to trial, the appellant filed a motion in limine, requesting that the trial court exclude his videotaped conversation with Harding in the holding cell. In a pretrial hearing, the appellant argued that it would be prejudicial "for the State to parade Mr. Taylor around in his jailhouse uniform" and that the State's playing an audiotape of the conversation would suffice. The State argued that the videotape was necessary in order for the jury to see the appellant's facial and physical reactions during the conversation. Without listening to the audiotape or viewing the videotape, the trial court denied the appellant's motion, concluding that the jurors had "a right to see how Mr. Harding was behaving in terms of whether or not what he's doing is believable and how the whole thing is set up. That's something clearly the jury has a right to do in judging whether or not the statement is to be believed." The defense countered that Mr. Harding could not be seen on the videotape. However, the trial court stated, "Well, but they can hear his voice intonations and all that. I'm going to deny

your motion anyway." The trial court offered to give a limiting instruction, and the defense stated that it would like an instruction.

Generally, a trial court's decision to admit or exclude evidence at trial will not be overturned absent an abuse of discretion. State v. James, 81 S.W.3d 751, 760 (Tenn. 2002). An abuse of discretion exists when the "'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

The State played the videotape for the jury during Melvin Harding's direct testimony, and we have reviewed the tape. The black and white video shows Harding sitting on the far right side of the holding cell. His face is not visible, but the viewer can see his hands from time to time and his feet. The appellant, wearing a jumpsuit with "DCSO" printed on the back, stands on the left side of the cell. Although the appellant moves around the cell during the seven-minute video and his body is visible, his face can be seen only briefly. The appellant's and Harding's conversation is mostly unintelligible, and it is often difficult to distinguish the appellant's voice from Harding's. However, being able to see the men's movements and gestures helps the viewer discern when Harding and the appellant are speaking. We note that after the State played the videotape for the jury, the trial court did not give a limiting instruction.

The appellant claims that the State's audiotape would have provided the jury with the same information as the videotape but without the prejudicial effect of the jail attire. This court has stated that "trial courts should take every precaution to avoid the display of the accused, who stands presumptively innocent, in prison garb or any type of restraint which reflects their custodial status." State v. Doreen Jones, No. M2003-01942-CCA-R3-CD, 2005 WL 639141, at *10 (Tenn. Crim. App. at Knoxville, Mar. 18, 2005). In light of the video's potential prejudice to the defense, we are puzzled as to how the trial court could determine that the videotape was the preferable evidence in this case without viewing it or listening to the audiotape. Unfortunately, the appellant did not include the audiotape in the appellate record, and without the audiotape for our review, we cannot make this determination. See Tenn. R. App. P. 24.

As to the appellant's claim that the jury's seeing him wearing jail attire was highly prejudicial and violated his right to due process, he cites various cases supporting his argument, including Estelle v. Williams, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 1693 (1976), in which the Unites States Supreme Court stated that forcing a defendant to stand trial while wearing prison clothes is a violation of due process because "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." However, all of the cited cases involved defendants who were forced to wear prison clothes during their trials, which did not occur in this case. Nevertheless, the State concedes in its appellate brief that the video's showing the appellant in jail attire was "likely somewhat prejudicial." However, given that the video was of short duration and that Harding had already testified, without objection, that his conversations with the appellant occurred while they were confined in the Davidson County Jail, we conclude that the video's probative value was not substantially outweighed by the danger of unfair prejudice. See

Tenn. R. Evid. 403. Therefore, we cannot say that the trial court abused its discretion by overruling the appellant's motion in limine.

C. Officer Smith's Testimony

The appellant claims that the trial court erred by allowing Officer Gary Smith to testify about the appellant's and Sabrina Lewis' familial relationship. He contends that Officer Smith's testimony that the appellant and Lewis were cousins was based upon unreliable hearsay and not admissible under Tennessee Rule of Evidence 803(19), the hearsay exception for reputation concerning personal or family history, because Officer Smith "could not establish that he had sufficient familiarity with the reputation to be able to testify about it" and was told by only one person that the appellant and Lewis were cousins. He also contends that the trial court should have excluded Officer Smith's testimony because the State failed to provide the defense with prior notice that the witness would testify. The State argues that the testimony was admissible under the hearsay exception and that the trial court properly concluded that the defense had prior notice about Officer Smith. Although we conclude that Officer Smith's testimony was inadmissible hearsay, the appellant is not entitled to relief.

On the morning of the second day of trial, the defense announced to the trial court that the State had informed it the previous night that the State was going to call Officer Smith to testify about the appellant's and Lewis' familial relationship. The defense objected on the grounds that it had no prior notice that Smith would testify and because Officer Smith had no personal knowledge about the relationship. The trial court stated, "I read his name yesterday." The trial court also asked the appellant's defense attorney if he had attended Sabrina Lewis' trial, and the attorney stated that he had sat through portions of it. The trial court stated, "Well, he testified to that at that prior trial, so I'm going to overrule your objection based on notice." Regarding the appellant's hearsay argument, the trial court stated that Officer Smith's testimony could be admissible under Tennessee Rule of Evidence 803(19), but that the defense could voir dire Officer Smith before he testified, and the trial court would rule on the admissibility of his testimony at that time.

Later, in a jury out hearing, Officer Smith testified that he was thirty-nine years old, had lived in Nashville all his life, and had relatives living in Nashville. The State asked Officer Smith if the appellant and Lewis were related, and Officer Smith said yes and "I guess cousins." On cross-examination, the defense asked Officer Smith if he knew about Lewis' and the appellant's familial relationship through a particular family member or from several individuals, and Officer Smith replied, "Just one particular family member." Officer Smith stated that his half-sister, Tori Renfro, told him that the appellant and Lewis were cousins. According to Officer Smith, Lewis' mother was Renfro's aunt, and Lewis and Renfro were first cousins. He stated that he knew Lewis' mother but did not know her name and was not related to her. He stated that Lewis' mother's home was in his patrol-zone, that he would see Renfro's car parked there, and that he would stop by to visit. A few years ago, Officer Smith stopped by the house and saw the appellant there. Officer Smith did not know the appellant and asked Renfro about him. Renfro said, "[O]h, that's my cousin." The following exchange then occurred:

Q. So then [Renfro] was saying that [the appellant] was her cousin?

A. Yes, sir, something like that. Yes, sir.

Q. Okay. But she wasn't saying that [the appellant] was Sabrina Lewis' cousin?

A. Well, they're all related, sir.

Q. How?

A. Aren't you related to your cousins? I mean, I don't know how they're related. She just made a statement saying they're related.

. . . .

Q. Both of them were cousins [of the appellant?]

A. Yes.

. . . .

Q. So do you know exactly how they're related, or do you just know they're cousins?

A. I don't know, sir.

Q. You just know they're cousins?

A. Yes, sir.

Q. You don't know how?

THE COURT: Asked and answered.

THE WITNESS: It's not my business, sir.

The trial court then stated, "Feel free to cross-examine him like you did there, but we'll allow him." On cross-examination, in front of the jury, the witness testified that he did not speak with anyone else about the appellant and Lewis being cousins and that he and Renfro discussed it "just once" and [i]t could have been three or four years ago."

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801(c). Generally, hearsay statements are inadmissible unless they fall under one of the recognized exceptions to the hearsay rule. Tenn. R. Evid. 802. Tennessee Rule of Evidence 803(19), which is almost identical to Federal Rule of Evidence 803(19), allows the admission of a hearsay statement for "[r]eputation among members of a person's family by blood, adoption, or marriage or among associates or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history." "Reputation, of course, refers to the collective assessment of a group of people." Neil P. Cohen, et al., Tennessee Law of Evidence § 4.05[3][b] (5th ed. 2005). Moreover,

> A witness who wishes to testify about someone's reputation within a community must demonstrate that he or she knows of the person and is truly familiar with the "community" in which the reputation has been formed, and that the basis of the reputation is one that is likely to be reliable. Where the alleged reputation is based on nothing more than rumors of unknown origins, or a single instance of 'someone told me so,' a proper foundation has not been laid for admitting such evidence under Rule 803(19).

Blackburn v. UPS, Inc., 179 F.3d 81, 101 (3d Cir. 1999) (discussing Federal Rule of Evidence 803(19)); see Cohen, Tennessee Law of Evidence § 8.24[2] (5th ed. 2005). "The determination of whether a statement is hearsay and whether it is admissible through an exception to the hearsay rule is left to the sound discretion of the trial court." State v. Stout, 46 S.W.3d 689, 697 (Tenn. 2001).

In the instant case, Officer Smith testified during the hearing and in front of the jury that Renfro told him that Lewis and the appellant were cousins. Lewis told him this fact one time, apparently from her personal knowledge. Officer Smith did not testify about the appellant's and Lewis' reputation among members of their family or community concerning their being related. Therefore, we believe his testimony was inadmissible under Rule 803(19) because it did not concern a "reputation." See, e.g., State v. Brunette, 501 A.2d 419, 424 n.6 (Me. 1985) (stating that in anticipation of the defendant's retrial for sexual crimes against the minor victim, the victim's mother's personal knowledge about the victim's birthdate, as opposed to "the reputation among members of his adoptive family concerning his birth," would be inadmissible under M.R. Evid. 803(19)); Moore v. Goode, 375 S.E.2d 549, 562-64 (W. Va. 1988) (stating that specific statements, as opposed to reputation evidence, regarding Goode's paternity were inadmissible under W. Va. R. Evid. 803(19)); In re Estate of Borowy, No. 249775, 2004 WL 2952555, at *1 (Mich. App., Dec. 21, 2004) (looking to Fed. R. Evid. 803(19) for guidance and concluding that decedent's statements to third parties regarding his paternity of appellee was inadmissible "because they did not pertain to a 'reputation' concerning the decedent's blood-relationship among members of a designated group"). Therefore, the trial court abused its discretion by admitting Officer Smith's testimony. However, given Mary Ann Fisher's identification of the appellant and the appellant's confession to Melvin Harding, the trial court's error was harmless. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

As to the appellant's claim that he had no prior notice about Officer Smith's testimony, Tennessee Code Annotated section 40-17-106 provides that "[i]t is the duty of the district attorney general to endorse on each indictment or presentment, at the term at which the same is found, the names of such witnesses as the district attorney general intends shall be summoned in the cause." The statute is directory rather than mandatory and does not necessarily disqualify from testifying a witness whose name has been omitted from the indictment. State v. Harris, 839 S.W.2d 54, 69 (Tenn. 1992). Rather, our supreme court has indicated that a defendant is not entitled to relief absent a showing of prejudice, bad faith, or undue advantage. Id.; see State v. Allen, 976 S.W.2d 661, 667 (Tenn. Crim. App. 1997). Specifically with respect to prejudice, "'it is not the prejudice which resulted from the witness' testimony but the prejudice which resulted from the defendant's lack of notice which is relevant.'" State v. Kendricks, 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996). The determination of whether a witness omitted from the indictment should testify lies within the sound discretion of the trial court. Allen, 976 S.W.2d at 667; Kendricks, 947 S.W.2d at 883.

The trial court stated that it had seen Officer's Smith's name the previous day, indicating that the defense had some prior notice of Officer Smith's testimony. In any event, the appellant has failed to state what more he could or would have done if the State had provided the defense with Officer Smith's name at an earlier date, and he, therefore, demonstrates neither any prejudice nor any undue advantage enjoyed by the State. See, e.g., State v. Hutchison, 898 S.W.2d 161, 170-71 (Tenn. 1994).

D. Victim's Statements

Next, the appellant claims that the trial court erred by allowing several witnesses to testify about the victim's statements after the shooting. Specifically, he contends that the statements were hearsay and that the trial court erred by concluding that the statements were admissible as dying declarations because there is no proof that the victim believed his death was imminent. The State contends that the victim's statements were admissible pursuant to the hearsay exception. We agree with the State.

In a pretrial hearing, the trial court ruled that the victim's statements were admissible as excited utterances and dying declarations. Pursuant to Tennessee Rule of Evidence 804(b)(2), "[i]n a prosecution for homicide, a statement made by the victim while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death" is admissible as an exception to the hearsay rule. This court has stated that a dying declaration has the following five elements:

> (1) The declarant must be dead at the time of the trial;
>
> (2) the statement is admissible only in the prosecution of a criminal homicide;
>
> (3) the declarant must be the victim of the homicide;

(4) the statement must concern the cause or the circumstances of the death; and

(5) the declarant must have made the statement under the belief that death was imminent.

State v. Hampton, 24 S.W.3d 823, 828-29 (Tenn. Crim. App. 2000). It is the final element which "provides the indicia of truth that justifies this hearsay exception." Cohen, Tennessee Law of Evidence § 8.35[2][f] (5th ed. 2005). This court has stated that "it is not necessary that the declarant state unequivocally a belief that death is imminent. Awareness of impending death has been inferred from the language and condition of the declarant, the facts and circumstances surrounding the statement, and medical testimony concerning the seriousness of the victim's condition." State v. Maruja Paquita Coleman, No. 01C01-9401-CR-00029, 1997 WL 438169, at *5 (Tenn. Crim. App. at Nashville, July 31, 1997). As stated previously, the determination of whether a hearsay statement is admissible through an exception to the hearsay rule is left to the trial court's discretion. Stout, 46 S.W.3d at 697.

In the instant case, Brenda Farmer testified that the victim told her, "I've been shot," was holding his chest, appeared frantic and scared, and repeatedly asked for help. Judith Summers testified that the victim told her he had been shot in the heart and to call 911, indicating that he believed he was gravely injured. Officer Fisher stated that the victim's breathing was labored and that the victim was very excited. Officer Chastain testified that the victim said he had been shot three times, and Dr. Deering believed that the victim would have realized he was seriously wounded. From these facts, we conclude that it can be inferred that the victim believed his death was imminent.[1] The trial court properly ruled that the victim's statements were admissible as dying declarations.

E. Sufficiency of the Evidence

Finally, the appellant claims that the evidence is insufficient to support the convictions. In support of his claim, he argues that (1) no physical evidence links him to the crimes, (2) Mary Ann Fisher's identification of him was made six months after the crimes and was unreliable, (3) no one saw him leave the store in the car Fisher saw speed away from the scene, (4) Melvin Harding's testimony was unreliable because Harding had seen information about the crimes on television and received money in return for his information about the appellant's confession, and (5) Debra Marks

[1]We note that in State v. Sabrina Renee Lewis, No. M2004-02255-CCA-R3-CD, 2006 WL 684590, at *8 (Tenn. Crim. App., at Nashville, Mar. 15, 2006), application for perm. to appeal granted, September 25, 2006), a panel of this court held that the trial court erred by admitting into evidence the victim's statement "I know she is" in response to Officer Chastain's question about whether "the lady with the vases" was connected to the crimes. The panel concluded that the victim's response was an opinion and that an opinion statement is inadmissible as a dying declaration. The appellant in the instant case does not make this argument. In any event, assuming arguendo that the trial court erred by admitting the statement as a dying declaration, given that the victim's remaining statements were admissible as dying declarations and given the evidence against the appellant, any error was harmless.

confessed to shooting the victim, gave the police details about the crimes, and owned a car that matched the description of the getaway car. The State claims that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Taken in the light most favorable to the State, the evidence shows that Sabrina Lewis visited Always Antiques in the weeks prior to the murder using the guise of selling vases to the victim. On July 13, 2001, she returned to the store with the vases, and the victim bought them. Lewis went outside and told the appellant that the victim had a lot of money. The appellant went inside and lured the victim to the back of the store with the intent of robbing him. The victim pulled a gun on the victim, shot him twice, and took money out of the victim's pocket while Lewis and her mother waited behind the store in an older-model gray car. Mary Ann Fisher saw the appellant flee from the store and saw Lewis driving in the direction that the appellant fled. Although Fisher did not identify the appellant as the man she saw outside Always Antiques until six months later, Detective Bernard testified that Fisher had no trouble remembering what she saw on July 13 and picked out the appellant's and Lewis' photographs. The appellant confessed about the crimes to Melvin Harding, and Harding gave Detective Bernard accurate details about the crimes that had not been released to the media. Although Marks also confessed, the police determined that she was probably involved in the crimes but did not actually shoot the victim. On cross-examination, the defense questioned Fisher about her identification of the appellant, Harding about his cooperation with the police, and Detective Bernard about Marks' confession. The jury, as was its prerogative, accredited the testimony of the State's witnesses and resolved any inconsistencies in favor of the State. We conclude that the evidence is sufficient to support the appellant's convictions for first degree felony murder and especially aggravated robbery.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

_____

NORMA McGEE OGLE, JUDGE